



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1416 OF 2012

(BEFORE HON. JUSTICE MAUREEN ONYANGO ON 13.3.2015)

JACKSON NZIOKA NDUNDA CLAIMANT

-VERSUS-

VIABLE DECO SOLUTIONSRESPONDENT

JUDGMENT

Jackson Nzioka Ndunda, the claimant herein filed this claim against the respondent Viable Deco Solutions alleging that the respondent contravened the provisions of the Employment Act by subjecting him to unfair working conditions by working extra hours without compensation by extra pay or leave in lieu, and by verbally terminating his contract and refusing to pay his terminal benefits.

In his Memorandum of Claim dated 15th August and filed on 17th August 2012 through Julia Kariuki & Co. Advocates, the claimant seeks the following reliefs:-

- a. **Service for four years**
- b. **One month salary in lieu of notice**
- c. **Leave allowance for the year 2011**
- d. **Interest on (b) and (c)**
- e. **Any other relief this court may deem fit and just to grant**
- f. **Costs of this suit**

The respondent filed a Memorandum of Reply on 24th May 2013 through Thuita Kiiru & Co. Advocates. In the reply the respondent admitted employing the claimant as a carpenter at a salary of Kshs 20,650/= per month from 2nd August 2001. The respondent however denied that it subjected the claimant to work overtime without pay or that it terminated the claimant's contract of employment verbally. The respondent averred that the claimant left employment on his own volition and was paid his full terminal benefits. The respondent denied that the claimant was entitled to payment as prayed or at all and urged the court to strike out the claim for disclosing no cause of action against the respondent.

The case was heard on 9th October 2014. The claimant testified on his behalf but the respondent did not call any witnesses. The claimant thereafter filed written submissions. The respondent did not file any written submissions even after being granted an opportunity to file.

The claimant was represented by Ms. Alunga holding brief for Mrs. Kariuki. The respondent was represented by Mr. Njenga who respondent informed the court that he will not be calling any witnesses.

The respondent was not represented on 18th November 2014 when parties were expected to confirm filing of written submissions and take date for judgment.

I have considered the pleadings and evidence. The issues for determinations are whether the claimant was terminated or left employment on his own volition and whether he is entitled to the prayers sought.

Parties are in agreement that the claimant was employed by the respondent in August 2007 as a carpenter and that his last salary was Kshs 20,650/=.

The claimant testified that the reason for termination of his employment was his failure to report to work on Sunday 27th March 2011. He stated that his letter of appointment required him to work from Monday to Saturday as stipulated therein. He was terminated verbally for not working on a Sunday by the Chief Executive Officer who told him to go away and wait until he is called back to work but was never called back.

The respondent did not call any evidence and the claimant's evidence remains uncontroverted.

The procedure for termination of employment is provided for in Section 41 of the Employment Act as follows:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”

Having failed to comply with the procedure for termination, the respondent's termination of the claimant's employment was unfair.

The claimant seeks payment of service for four years, one month's salary in lieu of notice and leave allowance for 2011. The claimant is not entitled to service pay as he was a member of National Social Security Fund (NSSF) as is evident from his payslip deductions for the same. I award the claimant one month's salary in lieu of notice in the sum of Kshs 20,650/=. On the issue of leave the claimant testified that he took his leave every August. Having worked for only 8 months from August 2010 to March 2011 the claimant is entitled to pay in lieu of 8 months leave in the sum of Kshs 13,767 which I award him. I also award him leave travel allowance of Kshs 1,600/= which is provided for in his employment contract and was not controverted by the respondent.

The respondent will also pay claimant's costs of this suit and interest on decretal sum at court rates from date of judgment.

Orders accordingly.

Dated and delivered in Nairobi this 13th day of March, 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)